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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred when it departed from the usual rule of deferring to a district court's findings of fact and exercise of discretion, and instead followed the recent trend of broadened appellate fact review.

2. Whether the court of appeals' reversal of both the district court's findings and its denial of a class action is such a derogation of the district court's duties as to call for an exercise by this Court of its supervisory powers.

3. Whether the court of appeals erred when it failed to adhere to the appropriate procedure for reviewing Title VII cases as determined by this Court in *Pullman-Standard v. Swint*, 102 S. Ct. 1781.

4. Whether the court of appeal's decision to certify a class action notwithstanding the district court's finding that the named parties could not represent the class is inconsistent with the decision of this Court in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395.

5. Whether the court of appeals departed from this Court's decision in *Hazelwood School District v. United States* when it disregarded petitioner's external labor statistics and instead relied solely upon the make-up of the petitioner's internal work force.

PARTIES INVOLVED

The parties involved in this petition are: Union National Bank of Little Rock, petitioner; and Melvin Paxton, Jr., Jerry Riley and Phyllis Mosely, and members of a class established by the court of appeals comprised of black employees who because of their race were denied promotions or received lesser salary increases at the time of their promotion than did similarly situated white employees during the period from January 1, 1974 to the time of completion of the trial, April 23, 1981, respondents.

STATEMENT IN COMPLIANCE WITH RULE 28.1

The petitioner is 80% owned by The Union of Arkansas Corporation, a one bank-holding company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Union National Bank of Little Rock, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding September 10, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 688 F.2d 552. It is set forth in Appendix A, *infra,* pp. 1a-39a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 519 F. Supp. 136. It is set forth in Appendix B, *infra,* pp. 40a-100a.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1982. It is set forth in Appendix C, *infra,* pp. 101a-102a. A timely petition for rehearing was denied on October 27, 1982. The order is set forth in Appendix D, *infra,* p. 103a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

Petitioner, Union National Bank, is a federally chartered bank with its main office and thirteen branches in Little Rock, Arkansas. It employs over 400 persons in the banking industry, in various divisions of professional, technical, managerial and clerical jobs.

The respondents are three individuals, Melvin Paxton, Jr., Jerry Riley and Phyllis Mosely and, members of a class established by the court of appeals which is made up of black employees who because of their race were denied promotions, or received lesser salary increases at the time of their promo-

tion, than did similarly situated white employees during the period from January 1, 1974 to the time of completion of the trial, April 23, 1981.[1] The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(4), 2201 and 2202 and 42 U.S.C. §§ 1981 and 2000e-5(f) ("Title VII"), which amended the Civil Rights Act of 1964.

An extensive trial was conducted successively before two district judges. After hearing testimony from eleven witnesses for fifteen days, the first trial judge, Chief Judge Eisele, recused himself. The second trial judge, Judge Woods, considered the record of the prior testimony taken before Chief Judge Eisele. He also heard testimony from thirty witnesses over a period of eleven days. Both judges heard testimony from three of the same witnesses, including testimony from petitioner's expert, Dr. James Gwartney, the petitioner's personnel manager, Joseph Zegler and intervenor Jerry Riley. The other witnesses heard by Judge Woods included five of respondents' witnesses, all black, and either employees or former employees of Union National, who denied that petitioner discriminated on the basis of race. Judge Woods concluded that the testimony of respondents' remaining witnesses was unpersuasive because each offered nonspecific, unsubstantiated, hearsay allegations of discrimination.[2]

The evidence in the case consisted of the testimony of many witnesses, exhibits, and a substantial analysis based on statistics and labor economics. Respondents' statistical presentation was largely in general terms, and at most supported an

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[1] The case, as it reached the appellate court, represented a consolidation of three cases. Paxton filed an individual and class claim on April 12, 1976. Katrina Terry and Phyllis Mosely intervened in the *Paxton* case on June 12, 1979. App. B, *infra*, p. 41a. Jerry Riley, Bobby Scott and George Spann intervened October 30, 1979. *Id.* On July 19, 1976, Norman Williams filed a second claim which was consolidated with *Paxton* on September 20, 1978. Harold Dominic Brown filed a third claim which was consolidated on August 28, 1979. On April 3, 1980, Bobby Scott was dismissed pursuant to settlement and Norman Williams' claim was dismissed pursuant to Fed. R. Civ. P. 41(b) on April 7, 1980. *Id.*

[2] Unless otherwise noted, references to the district court opinion are to Judge Woods' findings of fact and discretionary decisions.

inference of discrimination only in the areas of discharge and salaries. The district court considered the further analysis of petitioner's expert and concluded that "reasonable objective facts, unrelated to race, support[ed] the decisions to discharge,"[3] and that no significant difference existed when similarly situated persons' salaries were compared.

Stating that the "proof to the contrary [of respondents' claim] is overwhelming," App. B, *infra*, p. 53a, the district court found that respondents had not established a prima facie case, and ruled that even if one had been made out, the petitioner had rebutted it successfully.[4] The district court judge also held that respondents did not qualify as class representatives, and that the prerequisites of Fed. R. Civ. P. 23(a) had not been met. Accordingly, it denied a grant of class certification.[5]

The district court considered and dismissed the individual claims. With respect to intervenor Riley, the district court ruled that his average to above average skill, numerous meetings and memoranda evidencing his job deficiencies, and finally, testimony that he had less experience and skill than those promoted ahead of him, were all nondiscriminatory reasons supporting the petitioner's failure to promote him or to increase his salary.

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[3] App. B, *infra*, p. 53a. Petitioner's expert concluded that, with the exception of those employees who had been with the bank less than two years, no significant difference existed between the number of blacks and whites discharged. *Id.* at p. 51a. The difference appearing at the two year level, the district court concluded, gave rise to two possible inferences: first, that Union National, in its efforts affirmatively to recruit minorities, probably hired "high-risk" minority employees who because of their over-representation and poorer skills would accordingly be over-represented in the number of discharges; or second, that Union National selectively discriminated against only those blacks with less than two years experience. The district court concluded that the "high-risk" inference was more plausible than the selective discrimination inference.

[4] Indeed, Judge Woods expressed doubts, as had the first trial judge, of the wisdom of filing the suit because of its numerous flaws, which included inadequate discovery and adverse testimony elicited from respondents' own witnesses. App. B, *infra*, p. 43a.

[5] The district court decided that it was unnecessary to consider the fourth requirement of Rule 23(a), adequacy of representation, because of its conclusion on the individual claims. App. B, *infra*, p. 100a.

The court found that intervenor Mosely was not discharged because of her race and was instead discharged because she twice failed to obey a reasonable direct order of her supervisor after having been forewarned that a second refusal would lead to her discharge.

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. That court affirmed the district court's refusal to certify a class of black employees allegedly discriminated against in all terms and conditions of employment. The court of appeals, however, held that the district court had abused its discretion in failing to certify two subclasses; (1) black employees who were denied promotions or who had received lesser salary increases, and (2) black employees with less than two years of experience who were discharged. With respect to the discharge subclass, however, the court of appeals held that the plaintiffs and intervenors had failed to prove "a pattern and practice of racial discrimination against blacks in the discharge class," other than in the case of Phyllis Mosely. App. A, *infra*, p. 25a.

The court below found that all prerequisites of Rule 23(a) were satisfied, and then ruled on the merits of the promotional subclass, stating:

> [a]fter a careful review of the 6,000 page transcript and the 150 exhibits comprising this record on appeal, we are left with the firm conviction that the district court erred in holding that the bank did not discriminate against black employees with respect to promotions.

App. A, *infra*, p. 17a, *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The court of appeals considered several factors in deciding for respondents: the bank's subjective method of promotion and history of discrimination, evidence introduced on both the class action prerequisites and the individual claims and, finally, statistical proof. The appellate court found that the district court was wrong in accepting the petitioner's defense that an inference of discrimination was dispelled by a comparison of the Little Rock black labor pool and petitioner's black labor

pool. The appellate court also ignored the petitioner's evidence showing that the number of promotions of blacks within the bank's work force was at least proportional to the number of blacks as compared to whites in the total work force.[6] Instead it relied on a disproportionate number of whites receiving promotions in the upper levels of the bank's employees as the basis for comparing the number of black promotions. App. A, *infra*, p. 20a.

The appellate court also dismissed the bank's further defense to the promotion claim, namely, that a number of black employees within the bank were not objectively as qualified as some available white employees. App. A, *infra*, p. 22a. The appellate court stated that this was not supported by the record. It reviewed the bank's explanation for specific instances of failure to promote on the grounds of inadequate experience or lack of education, and found them unpersuasive.

The court below then considered the individual claims, and concluded that the district court erred in its dismissal of Riley's promotion claim.[7] The appellate court concluded that Riley "had more experience... he was better educated and he had a good work record." App. A, *infra*, p. 28a. The court below gave credence to Riley's testimony that he was qualified for a particular promotion and found no basis for the district court's decision to accept the testimony offered by the petitioner that the person promoted was better qualified.[8]

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[6] *See, e.g.* the district court opinion, App. B, *infra*, p. 70a, reflecting Defendant's Exhibit 34(a) (observed rate of actual black promotions exceeded expected rate for years 1974-80).

[7] The court of appeals considered and ruled favorably on the specific issue of Riley's promotion to lead control clerk, notwithstanding its admission that the district court had not addressed the specific issue and instead had addressed the overall promotion claim. The court of appeals explained:

> We have chosen . . . to treat the court's general conclusion . . . as its finding of fact on this issue. . . . We have done so because even if we afford that "finding" the deference an appellate court must give to the district court's findings of fact, it cannot stand.

App. A, *infra*, p. 27-28a.

[8] The court below stated that it could independently judge Riley's testimony because Judge Woods did not observe the witness but only read from the transcript. App. A, *infra*, p. 28a n. 23. It did not explain its rejection of the district court's favorable credibility determination on the bank employ-

(*footnote continues*)

With respect to Mosely, who was discharged for twice refusing to comply with instructions of a supervisor, the court below ruled that her work record, her overtime record, and the statistics showing discrimination in the promotion subclass established a prima facie case of discrimination.[9] It concluded that the district court's findings to the contrary were clearly erroneous. The court of appeals also ruled that Mosely had established a claim of discrimination in promotion on the basis of her education, experience and work record, and evidence that the bank promoted persons with less or no experience over Mosely. The court of appeals stated that petitioner's articulation of a legitimate explanation—that a more qualified person was hired—was insufficient.[10]

With respect to Paxton, the court of appeals determined that the decision of the district court against him was not clearly erroneous. It did, however, direct an injunction against the bank requiring it to refrain from making inquiries such as it had made of Paxton relating to his filing of charges and his dissatisfaction with the bank.[11]

The court of appeals also directed the entry of a decree "which will insure that race will not be a factor in future promotional decisions by the bank." App. A, *infra*, p. 35a. It

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(*footnote continued*)

ees' testimony, or why the factual determination was not one allocated to the presiding district judge rather than to the court of appeals. And, the court below failed to consider that Judge Woods did, indeed, personally hear part of Riley's testimony.

Moreover, in *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982), "the District Court's findings of fact were entirely based on documentary evidence." 102 S. Ct. at 1796 (Marshall, J., dissenting). Yet this Court held the district judge's findings should not have been reversed by the court of appeals.

[9] The court below also found important the fact that no other employee had been discharged for the same reason that Mosely was discharged and that the bank's Personnel Handbook did not make the offense a ground for discharge. App. A, *infra*, p. 33a. The district court had found as a matter of fact that the refusal to follow a reasonable order was a flagrant offense for which a supervisor could terminate an employee. App. B, *infra*, p. 57a.

[10] The district court did not make a specific finding on the issue of whether Mosely had been discriminatorily denied a promotion.

[11] The court of appeals affirmed the action of the district court in dismissing the claims of Katrina Terry, George Spann and Harold Brown, as well as Paxton's claim of wrongful discharge. App. A, *infra*, p. 34a.

spelled out in considerable detail the internal operating procedures and standards which the bank must adopt in order to meet this requirement.

REASONS FOR GRANTING THE WRIT

I. The Appellate Court Erred by Engaging in an Independent Fact Review of the Merits of the Individual and Class Claims.

A. The Appellate Court Independently Evaluated the Evidence, Contrary to This Court's Decisions on the Proper Scope of Appellate Review.

This Court set forth the definitive test for appellate review of a district court's findings of fact in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

333 U.S. at 395.

Recently this Court reiterated the standard for appellate review of a district court's findings of fact in a Title VII suit:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous.

Pullman-Standard v. Swint, 102 S. Ct. 1781, 1789 (1982).[12] Through these decisions, it is established that appellate courts

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[12] In *Pullman*, the issue before this Court was "whether a Court of Appeals is bound by the 'clearly erroneous' rule of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system . . . ." 102 S. Ct. at 1783. This Court reversed the Fifth Circuit's finding of intent to discriminate because the court of appeals, contrary to Rule 52, reached that conclusion by independently reviewing the district court's "ultimate" finding that no intent to discriminate existed.

may not make their own independent redetermination of the facts found below.

Appellate courts are similarly obligated to abide by *discretionary* decisions made by a district court judge. The general rule provides that a district court's exercise of discretion will not be overturned unless the appellate court decides the district court has "abused its discretion."[13] Reasonable discretionary decisions are deemed unassailable because of the district court judge's personal participation in the dynamics of the trial.[14]

The exercise of a district court's discretion extends to the decision to certify a class and to name the proper class representatives in Title VII cases as well.[15] Thus, regardless of the substantive underlying claim, an appellate court must be convinced that the district court was in clear error before it can rule that the district court abused its discretion in denying certification.

Notwithstanding the "definitive test" for Rule 52, and the clear rule that great deference is due to trial courts when they exercise their discretion, appellate review standards have not been carefully followed. First, with respect to the "clearly erroneous" standard, appellate courts have in recent years frequently avoided the requirements of Rule 52(a). This Court has rejected the "ultimate" and "subsidiary" fact distinction, one attempt to avoid the "clearly erroneous" standard.[16] This Court has also stated that an appellate court may not "substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts

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[13] 3B Moore's Federal Practice ¶ 23.50 (2d ed. 1982). The "abuse of discretion" standard has been likened to "a pasture in which the trial judge is free to graze;" that is, an area in which the trial judge may be wrong but not subject to reversal. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978).

[14] Rosenberg, *supra* note 13, at 183.

[15] 3B Moore's Federal Practice ¶ 23.50 at 23-437 (a district court's determination of a class action "should be given great respect by a reviewing court"). *See also Wright v. Stone Container*, 524 F.2d 1058 (8th Cir. 1975).

[16] *See, e.g., Pullman-Standard v. Swint, supra* (in a Title VII case the "ultimate" finding of an intent to discriminate is subject to Rule 52).

another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" *Inwood Laboratories v. Ives Laboratories,* 102 S. Ct. 2182, 2190 (1982), *citing United States v. Real Estate Boards,* 339 U.S. 485, 495 (1950).

An appellate court likewise may not follow the course criticized in this Court's decision in *Pullman*—an acknowledgement of the "clearly erroneous" rule, followed by an independent factual review.[17] Rather, this Court has made it clear that off-hand acknowledgment of the Rule 52 standard is not sufficient when an appellate court's review

> strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Pullman-Standard v. Swint, supra, 102 S. Ct. at 1791.[18] The same possibility exists to permit an independent appellate

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[17] Indeed, one commentator, twenty-five years ago, recognized this possibility of paying "lip service" to the review standards, although he suggested that appellate judges would not commit such an error:

> The courts which have disregarded Rule 52 in substituting their judgment for that of the trial court *could* accomplish the same purpose while complying with the rule merely by announcing that the finding with which they disagree is "clearly erroneous." But I think we can safely assume that appellate judges do make a conscientious attempt to confine their review to that authorized by law, and that, so far as human frailties permit, they do not regard a finding as clearly erroneous merely because it differs from the finding they might themselves have made.

Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751 at 770 (1957) (emphasis in original). The frequency with which other commentators have noticed the problem, and the increasing number of cases reaching this Court on this issue, undermine the author's assumption. Moreover, since Professor Wright's article appeared, this Court has closed at least one avenue by which an appellate court can overtly escape compliance with the Rule. *See, e.g., Pullman* (error to designate facts as "ultimate" in order to avoid application of "clearly erroneous" standard).

[18] This Court's opinion in *Pullman* demonstrates that even a recital of the "definite and firm conviction" language of *Gypsum* is insufficient adherance when the appellate court's actual decision indicates action to the contrary. *Pullman* at 1781-83.

evaluation of the decision to certify a class—an acknowledgement of the abuse of discretion standard, as a prelude to an independent factual review.

Application of these reviewing standards to the decision below indicates that the court of appeals did not carefully defer to the district court's findings of fact and class certification conclusion derived after the twenty-six day trial. The appellate court's opinion shows instead an "independent consideration of the totality of the circumstances it found in the record." In not one instance in its opinion does the court below refer to Rule 52(a). At one point in the opinion it refers to the rule in *Gypsum*, yet in so doing the appellate court admits it has engaged in an independent review. App. A, *infra*, p. 17a. The appellate court refers to several of the district court's findings as "in error," yet its discourse on new facts not considered by the district court[19] shows no deference to the district court's findings of fact that petitioner had not discriminated on the basis of race. The appellate court abandons the district court's choice of inference on the discharge claim and instead accepts the conclusion with the more "sinister" cast.[20]

The treatment of the individual claims by the court of appeals also reflects the sort of independent review disapproved by this Court in *Pullman* and *Inwood*. The court of appeals held that Riley was successful in establishing discrimination, notwithstanding the district court's findings of fact to the contrary, and its determinations with respect to the credibility of petitioner's witnesses. As to Mosely's claim, the court of appeals entirely ignored the district court's finding of fact that an offense for which summary dismissal is authorized includes an employee's "refusing to follow a reasonable order. . . ." App.

[19] For example, the appellate court found that the receipt of unemployment compensation benefits by former bank employees was relevant to the inference of discrimination. App. A, *infra*, pp. 23a, 33a n.27. The district court's findings of fact do not demonstrate that this factor was relevant to its decision.

[20] *Inwood*, *supra* at 2190. *See, e.g.*, the "high-risk" explanation discussed in note 3, *supra*, p. 4.

B, *infra*, p. 57a. And, the court below independently reviewed the promotion claim of respondent Riley, though it was not addressed by the district court and, indeed, the appellate court ruled on the merits of that claim.

The decision below that the trial court abused its discretion in denying class certification to two subclasses of discriminatees is similarly in error. The court of appeals made its own review of the record as a basis for its determination that the plaintiffs had succeeded on the merits of the promotion subclass. The court of appeals disregarded the district court's finding that too few discriminatees existed to meet the numerosity requirement and instead ruled that the persons whom the district court found not to be credible witnesses satisfied those requirements.

B. The Decision Below Raises a Basic Issue of the Scope of Appellate Review Which Merits Exercise of This Court's Supervisory Powers.

The decision below raises an important and recurring issue, as evidenced by this Court's recent decisions. In the absence of an exercise of this Court's supervisory powers, the decision will stand as encouragement to other courts to broaden the scope of appellate review under both Rule 52(a) and the abuse of discretion standard. The consequence is to encourage appeals, thus adding to the volume of cases taken to appellate courts, as well as distorting the appropriate relation between trial and appellate courts.

Commentators have recognized the trend of expanding appellate review and have noted its adverse consequences. The deleterious results have been described by one commentator as an impairment in the "confidence of litigants and the public in the decisions of the trial courts and a [multiplication in] the number of appeals."[21] Others cite a concomitant lowering in the

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[21] Wright, *supra*, 41 Minn. L. Rev. at 781. Professor Wright saw the expansive trend as manifesting itself in four specific areas:

> review by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear

(*footnote continues*)

morale of district court judges, a decrease in the likelihood of settlements at the trial level and an increasing disrespect for our legal system as consequences of the trend.[22] When a district court's exercise of discretion is afforded little deference, there are similar adverse results.[23] Wide review of factual and discretionary determinations invites appeals and contributes substantially to the volume of cases in the courts of appeals —and in this Court.[24]

The trend to expand appellate review is not only of adverse consequence to the system for the administration of justice—it is also entirely inconsistent with this Court's oft-repeated determination of the orderly and efficient delegation of judicial duties. District courts are given the responsibility of fact finding because they are adept at that function, and because they are in the best position to judge the credibility and demeanor of witnesses. In this case, Judge Woods personally heard thirty of the thirty-eight witnesses, including that of the petitioner's expert and intervenor Riley. Appellate courts, in

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(*footnote continued*)

> weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordinary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled.

Id. at 751-52. He concluded that the history of appellate review of these four areas "should be enough to persuade anyone that appellate power is rapidly on the increase." *Id.* at 778.

[22] Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous" Rule Being Avoided?* 59 Wash. U.L.Q. 409, 426-27 (1981).

[23] Rosenberg, *supra* note 13, at 187.

[24] As Judge Rubin wrote (when he was a district judge): "The first and simplest way to reduce the appellate workload is to decrease the rate of appeal from trial court dispositions." Rubin, *Views from the Lower Court,* 23 U.C.L.A. L. Rev. 443, 451 (1976). When appellate courts freely review factual and discretionary decisions, appeals are encouraged, and the volume of cases brought up for review inevitably increases.

contrast, are left with reviewing a "cold" record.[25] These same considerations apply when a district court exercises its discretion in matters such as class certification.[26]

Even in cases where both the district court and appellate court could be considered equally proficient at reviewing the record, that conclusion disregards the proper role of appellate courts. The proper and primary task of appellate courts is not to find facts but to "interpret the law."[27] Thus, neither efficiency nor jurisdictional goals are served by permitting appellate courts to expand their review of the district court's findings of fact and exercise of discretion. Exercise of this Court's supervisory powers is needed to evaluate this clearly developing movement toward broadening the scope of appellate review.

II. Because of a Failure to Limit the Scope of Review, the Decision Below Conflicts with This Court's Decisions on Appropriate Procedure in Employment Discrimination Cases.

A. The Decision Below Conflicts with This Court's Decision in Pullman-Standard v. Swint.

This Court set forth the general rule to be followed when an appellate court has determined that the district court has proceeded under an erroneous view of the law or has failed to make a finding of fact for that reason:

> [T]he usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are

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[25] *Inwood*, 102 S. Ct. at 2188-89 (clearly erroneous standard "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence").

[26] Rosenberg, *supra* note 13, at 182-83.

[27] *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the "Clearly Erroneous" Rule Been "Clearly Erroneous"?* 52 St. J. L. Rev. 68, 90 (1977). The author concludes that this is the very point most often ignored by proponents of a *de novo* review of the record by appellate courts.

> infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

Pullman, supra, 102 S. Ct. at 1791-92.

The court below failed to follow this "elementary" scheme. *Pullman, supra* at 1792. In the exact circumstances in which this Court has determined that remand is appropriate—and indeed, an appellate obligation—the court below failed to remand. Instead, it applied what it considered to be the appropriate legal standard[28] and made its own finding of fact.[29] This trend in the courts of appeals to make independent determinations of fact is of special importance in Title VII cases, in view of the great volume of such cases. This departure from the settled course of proper appellate procedure warrants review in light of *Pullman.*

B. The Decision Below Conflicts with This Court's Decision in *East Texas Motor Freight v. Rodriguez,* That a Class Should Not Be Certified When the Named Parties Are Not Adequate Representatives.

In *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, this Court considered an appellate decision which involved a district court's ruling that named plaintiffs could not represent a class in a proposed class action discrimination suit. The district court there dismissed both the individual and class claims. The court of appeals reversed, disregarding the district court's finding of plaintiffs' inability to represent the class, and instead certified a class and imposed class wide liability. This Court ruled that the appellate court erred in certifying a class when "it was evident by the time the case reached that court that the named plaintiffs were not proper class representatives." 431 U.S. at 403.

In the decision below, the appellate court was equally in error in its handling of the class certification issue. The court below failed to give proper deference to the district court's findings of fact that the named parties could not represent the

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[28] App. A, *infra,* p. 13a.

[29] App. A, *infra,* p. 14a.

class. Because of this error, the court of appeals incorrectly certified a class notwithstanding the fact that the weight of the evidence demonstrated that the respondents could not represent the class. Thus, the decision below conflicts with *East Texas Motor Freight.*

C. The Decision Below Conflicts With This Court's Decision In *Hazelwood School District v. United States*, on The Proper Use Of Statistics In Employment Cases.

In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), this Court approved the action of a court of appeals which had compared the racial composition of an employer's staff with the racial composition of the qualified public school teacher population in the relevant labor market. In reaching this result, this Court cautioned:

> when special qualifications are required to fill particular jobs, comparison to the general population . . . may have little probative value.

433 U.S. at 308 n. 13.

Contrary to this statement by this Court, the court below in effect ruled that all of petitioner's employees were equally qualified for all positions which became available for promotion. The court of appeals brushed aside the petitioner's showing of the qualifications of individuals available in petitioner's work force, and the methods used by the petitioner to select individuals for promotion, see *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and relied simply on undifferentiated internal work force statistics. In doing so, the court of appeals set up a standard which is self-defeating, since in the long run, it can inhibit minority recruiting and other affirmative employment policies as well. Under the rule of the court below, an employer who does well in affirmative minority hiring, is, by that fact alone, restricted in making decisions on promotion, despite the fact that proper standards for promotion may require qualities in employees which are not taken into account in the original hiring. This Court should review the decision below to correct this departure from this Court's approach in *Hazelwood*, enhanced as it was by the appellate court's independent fact review.

Conclusion

The decision below disregards the proper scope of appellate review. Instead of adhering closely to the "clearly erroneous" standard of Rule 52(a), the court of appeals engaged in an independent fact evaluation and reached its own conclusion that petitioner discriminated against respondents. Instead of deferring to the district court's discretionary denial of a class certification, the appellate court independently reviewed the record and certified two narrow classes of its own definition. Comparison of the two opinions below clearly indicates that the appellate opinion does not reflect the district court's findings of fact, and shows instead an independent factual evaluation by the appellate court. Because of a failure to confine itself to the district court's findings, the court below similarly departed from both the appropriate standard of appellate review for discretionary decisions, and the proper procedure outlined by this Court for Title VII cases. Finally, the decision below does not comply with this Court's decision on the proper use of statistical proof.

Because of these erroneous decisions, there is no support for the injunction ordered by the court of appeals, and that, too, should be reversed.

This sort of "free-wheeling" by appellate courts is a matter of special importance in Title VII cases. It is a considerable cause of (1) the difficulty in settling cases out of court, (2) an increase in the number of appeals, (3) uncertainty in the law, and (4) to an increasing extent, disrespect for the judicial process. District courts should be the primary fact finding tribunals. It is clear, however, that courts of appeals take ever-widening views of their roles with respect to facts and judicial

discretion. This Court should grant review in this case in order to clarify the appropriate role of appellate courts on these questions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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